No. 672

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IN THE

Supreme Court of the United States

OCTOBER TERM—1944

INTERNATIONAL CARRIER-CALL
AND
TELEVISION CORPORATION,
Petitioner,

against

RADIO CORPORATION OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

L. STEWART GATTER,
Counsel for Petitioner.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

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Petition for Writ of Certiorari

To the Honorable, the Judges of the Supreme Court of the United States:

The petition of International Carrier-Call and Television Corporation respectfully shows to this Honorable Court as follows:

1. As a ground for this petition, the Courts below have entered conflicting decrees, orders, judgments and mandates on the question of federal jurisdiction of the District Court to try the issues of unfair competition raised by the pleadings herein. As a further ground, the petitioner verily believes that this Court has not passed upon the question of jurisdiction over an issue of unfair competition arising under the assignment statutes of the United States.

2. At the outset, petitioner respectfully shows to this Court that there were two actions brought by the petitioner, one against the respondent Radio Corporation of America and its operating subsidiary, RCA Manufacturing Company, Inc., for (a) infringement of the plaintiff's patent; and (b) unfair competition by the defendants against the plaintiff and its operating subsidiary, the American Carrier-Call Corporation; and a second action against the respondent (the within action) for unfair competition against the petitioner and its said subsidiary. It was necessary that the petitioner (as it verily believed at that time) bring the second suit, because, as will appear hereinafter, the petitioner was precluded from giving any evidence in the first action as to the acts of unfair competition practiced against the petitioner's exclusive licensee-operating subsidiary, the American Carrier-Call Corporation (now bankrupt) by an order of the District Court at Motion Term on the ground of a lack of diversity of citizenship (the exclusive licensee-subsidiary, American company, being a Delaware corporation, and the defendants being also Delaware corporations—the petitioner is a New York corporation).

3. On the 24th day of February, 1939, the petitioner herein brought its complaint against the respondent in Action No. 1, for infringement of United States Patent No. 2,114,718, issued to Sol J. Levy on the 19th day of April, 1938, entitled "Two-Way Intercommunicating Loud-Speaker Systems for Power Circuits," of which patent petitioner was the assignee. A second cause of action was set out in said complaint for unfair competition practiced against the plaintiff and its licensee-subsidiary, the American company. Issue was duly joined.

4. In the pre-trial proceeding in said Action No. 1, the Motion Term of the District Court, by its order (COXE, *J.*) dated March 23, 1940 (f. 147), that the plaintiff be "limited on any examination before trial and at the trial to evidence of direct competition with the plaintiff, exclusive of competition between the defendants and the American Carrier-Call Corporation," precluded the petitioner from offering any evidence, before trial or at the trial, of any unfair competition by the defendants against the American company, and this notwithstanding, by the express terms of an exclusive license, the petitioner had reserved the right to bring such action on behalf of its said American company subsidiary (f. 10).

5. Thereafter, the Motion Term of the United States District Court for the Southern District of New York, on four separate occasions, denied motions by the petitioner to include in the said infringement action (the first action), under the count therein for unfair competition, the rights and claims of the American company, all of which is concisely summarized in the decision of the said Motion Term as follows (MANDELBAUM, *J.*):

> "Plaintiff seeks leave to amend its complaint by adding a third cause of action. This consists of a claim by American Carrier Call Corporation (American) against the defendants for unfair competition. The complaint in its present form pleads two causes of action. First, for patent infringement and second, for damages sustained by the plaintiff by reason of the defendants' having unfairly competed with American. (The plaintiff owns 50% of the stock of this corporation.)
>
> An examination of what has previously transpired in this matter forecloses me from granting the plaintiff the relief it seeks.

First, Judge Coxe has held, in effect, on the defendants' motion for summary judgment addressed to the plaintiff's second cause of action (see opinion dated March 14, 1940) that the plaintiff could not prevail on the second cause of action. Disposition thereof was left to the trial judge for reasons which are presently immaterial.

Second, the plaintiff sought to implead the trustee in bankruptcy of American as a party plaintiff in its claim against the defendants. Judge Goddard held (opinion dated June 4, 1941) that there was no diversity of citizenship between American and the defendants and accordingly denied the motion for lack of jurisdiction.

Third, one Diehl obtained by assignment the claim of American against the defendants and moved to be impleaded as a party plaintiff. The plaintiff joined in that application. Judge Clancy, on December 30, 1941, denied the motion citing the decisions of Judge Coxe and Judge Goddard.

Fourth, on January 5, 1941, plaintiff obtained by assignment from Diehl the claim of American and now moves in this motion to amend its complaint to plead as a third cause of action the American claim.

This chronology of events reveals an obvious attempt to relitigate the prior motions which were denied.

It is the law of the case (opinions of Judge Coxe and Judge Goddard, supra) that the claim of the American, if any, has no relation to the issues now in this case. It also appears to have been established that the claim of American is not joint, but entirely separate and distinct from that asserted by the plaintiff.

The motion is denied."

6. This decision was affirmed by the United States Circuit Court of Appeals for the Second Circuit (decided May 3, 1944, by L. HAND, SWAN and AUGUSTUS N. HAND, *JJ.*), although a motion for permission to reargue said determination is still pending before said Circuit Court.

7. Petitioner avers that there was thus established the law of the case as between the parties, viz. that the Court was without jurisdiction.

8. Petitioner's efforts thus being unavailing, it sought to still obtain its rights by commencing a new and separate action (the within action) for unfair competition practiced by the respondent against the petitioner and its assignee-subsidiary-exclusive licensee, the American Carrier-Call Corporation.

9. The respondent then forced the petitioner to trial at an inopportune time, while the patent infringement count had been lost by the petitioner and an appeal therefrom was pending in the Circuit Court. Therefore, the petitioner itself raised the question of jurisdiction. The District Court (RIFKIND, *J.*—f. 162 to f. 165, incl.) and subsequently the Circuit Court of Appeals for the Second Circuit, by its affirmance thereof, found that the Court did have jurisdiction of such unfair competition.

10. The essence and effect of these decisions is that the Court below has found, as between the same parties and arising out of the same subject matter, that on the one hand there was no jurisdiction over the issue of unfair competition as between the American Carrier-Call Corporation and the respondent, and on the other hand, that there was such jurisdiction.

11. Petitioner respectfully avers that the Courts below cannot be correct in both positions.

12. If the Court had jurisdiction of the issue of unfair competition from the beginning, the petitioner, when it first pleaded the issue in the infringement suit, Action No. 1, should have been permitted to try its cause accordingly, and thus avoid the prejudicial, unfair and inequitable position in which it found itself.

WHEREFORE, in view of the premises, petitioner prays that this Honorable Court will grant its writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit requiring that the record and its decree be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse the said decree and remand the said case, and give to the petitioner such other and further relief as the nature of the case may require, and to the Court may seem proper in the premises.

INTERNATIONAL CARRIER-CALL
AND TELEVISION CORPORATION
By L. STEWART GATTER

L. STEWART GATTER, Attorney
36 West 44th Street
New York 18, New York

State of New York, }
County of New York, } ss.:

L. STEWART GATTER, being duly sworn, says that he is attorney for International Carrier-Call and Television Corporation, the petitioner above-named, and as such had personal charge for it of the case in the foregoing petition mentioned in the United States Circuit Court of Appeals for the Second Circuit; that he has read the said petition by him subscribed and that the facts therein stated are true to the best of his information and belief.

L. STEWART GATTER.

Sworn to before me this 9th day of November, 1944.

JULIA COADY
Notary Public, Queens Co. No. 358
Cert. filed in N. Y. Co. No. 1006, Reg. No. 619-C-6
Commission expires March 30, 1946

(Seal)